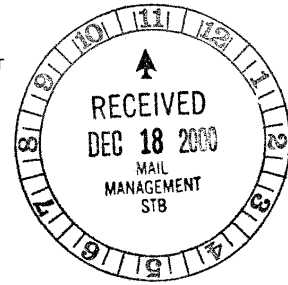


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December 18, 2000

**HAND DELIVERY**

Surface Transportation Board  
Office of the Secretary  
Case Control Unit  
Attn: STB Ex Parte No. 582 (Sub-No.1)  
1925 K Street, N.W.  
Washington, DC 20423-0001

Re: Ex Parte No. 582(Sub-No.1) Major Rail Consolidation Procedures

Dear Ladies/Gentlemen:

Enclosed please find an original and 25 copies of the Reply Comments on Behalf of the Port Authority of New York and New Jersey to be filed in the above-captioned proceeding. In addition, please find a 3.5-inch IBM-compatible floppy diskette in WordPerfect 9.0 of the same document.

Very truly yours,

Paul M. Donovan

ENTERED  
Office of the Secretary

DEC 19 2000

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Public Record

201044



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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EXPARTE NO. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

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**REPLY COMMENTS ON BEHALF OF THE  
PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

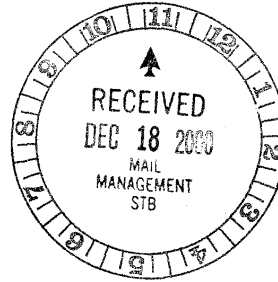
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Attorneys of the Port Authority of  
New York and New Jersey

Dated: December 18, 2000



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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EX PARTE NO. 582 (Sub-No. 1)  
MAJOR RAIL CONSOLIDATION PROCEDURES

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**REPLY COMMENTS ON BEHALF OF THE  
PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

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**INTRODUCTION**

The Port authority of New York and New Jersey ("the Port Authority") filed comments in this proceeding on May 16, 2000, and on November 17, 2000. As noted in its comments of November 17, the Port Authority believes the Board's Notice of Proposed Rulemaking embodied the substance of most of the Port Authority's suggested revisions to the Rail Consolidation Procedures, and accordingly, the Port Authority supports the Proposed Rules with the relatively minor adjustments suggested in those comments and those contained herein.

In their comments, various rail carriers and the Association of American Railroads ("the AAR") take issue with several key elements of the Proposed Consolidation Procedures. In the

opinion of the Port Authority, those criticisms are largely unfounded and should be rejected. In one case, however, approval of voting trusts under a “public interest” test, the Port Authority does agree, at least in part, with CSX. Accordingly, the Port Authority suggests that while voting trusts should be reviewed and approved by the Board prior to their becoming effective, a more appropriate test would be one focusing on control issues and insuring the financial viability of the surviving carrier(s).

In addition, the comments of the Canadian National (“CN”) misinterpret the focus of the Board’s concerns with respect to the possible negative impacts of transnational consolidations, particularly as those may involve negative impacts on U.S. ports. These comments will be addressed below.

### **VOTING TRUSTS**

In its initial comments of May 16, 2000 (at p. 13-15), the Port Authority suggested that while Section 1180.9 of the current Consolidation Procedures provided for the submission of information sufficient for the Board to assess the financial impact of any proposed consolidation, but that the information, filed after the approval of the voting trust, and therefore after conclusion of the financial aspects of the transaction, was too late to be of any real significance. The Port Authority noted that in the Conrail consolidation, for example, the transaction had essentially become a *fait accompli* before any financial information was submitted to the Board.

Accordingly, the Port Authority suggested that applicants should be required to supply financial information before the approval of any voting trust. The purpose of this preliminary filing was, in the opinion of the Port Authority, to “disclose, with reasonable certainty, that the proposed transaction would not undermine the ability of the surviving carrier(s) to have or raise sufficient

debt and capital to make necessary investments in the ongoing rail operations.”

The Board has proposed a procedure for approving voting trusts at a time and generally in a manner that would meet the goals of the Port Authority in its comments. The Board has, however, imposed a “public interest” test with which to evaluate the voting trust and determine whether it should be approved. As CSX has pointed out in its comments, meeting such a test at the earliest stage of the proceeding may be difficult or, indeed, impossible. In light of those comments, the Port Authority suggests that the Board approve voting trusts, under the procedures set forth in its proposed rules when the carriers establish that the voting trust will properly address the control issues as is currently the case, and that the financial aspects of the proposed transaction will not leave the surviving carrier(s) in a situation where it or they will not be able to raise sufficient debt or capital monies to meet the investment needs of the carrier(s). This type of examination would, in the Port Authority’s opinion, protect the carriers from being forced to meet an unreasonable burden of proof, while at the same time, protect the public from further service deterioration based on the inability of the carriers to raise capital funds.

#### **TRANSNATIONAL IMPACTS**

In its comments, CN argues that the Board’s proposed rules requiring the Board, in any transnational consolidation proceeding, to “assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations, and be detrimental to the interests of the United States”, is “not a reasonable proposal....” The Port Authority strongly disagrees with the CN’s comments in this regard.

The CN concludes: “There would have to be something very peculiar about wholly-privatized and publicly traded freight railroads to legitimize an across-the-board concern that they

are instruments of national or provincial political agendas that displace normal economic incentives.” Implied in this line of argument is the incorrect premise that it would be contrary to the economic interests of a foreign railroad to implement a plan conceived by a foreign government or governmental interest, the purpose of which is to discriminate in favor of foreign interests at the expense of U.S. interests.

For example, in 1992, The Task Force on the Future of the Port of Halifax recommended that: “the compensatory rate restrictions on railways in the National Transportation Act be amended to permit Canadian railways to charge less than compensatory rates for the movement of import/export containers where the principal objective of such pricing is the maintenance or promotion of increased import/export container traffic through Canadian ports.” The Task Force went on to recommend that the railroads reducing rates below compensatory levels to attract traffic away from the U.S. ports, principally New York/New Jersey, to the Canadian port of Halifax, be compensated by various federal and provincial tax reductions and incentives. It would hardly be contrary to the economic interests of the CN, whether it was a governmental agent or a fully privatized entity, to take advantage of tax breaks to reduce its rates below a compensatory level, if the costs to it of such reductions were less than the net benefits of the tax breaks.

The Board’s proposed procedures do not presume that transnational consolidations will involve discriminations against U.S. interests of the type outlined above, they merely suggest the possibility of such discriminations, and provide U.S. interests, including U.S. ports, with an opportunity to address those possible discriminations in consolidation proceedings. Thus, the Board’s consolidation procedures on transnational transactions should be adopted as proposed.

#### **CONCLUSION**

In view of the foregoing, the Port Authority believes that the proposed consolidation procedures, with the voting trust amendment noted above, should be adopted without change.

Respectfully submitted,

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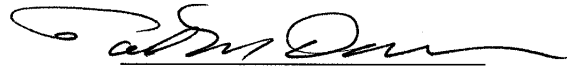
A handwritten signature in black ink, appearing to read "Paul M. Donovan", is written over a horizontal line.

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Attorneys for the Port Authority of  
New York and New Jersey

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 18<sup>th</sup> day of December, 2000, caused the foregoing document to be served by first class mail, postage prepaid, or by hand delivery, on all parties of record in this proceeding.

  
Paul M. Donovan